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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM 1992

HAROLD LAYTON,
Petitioner
v.
GARRARD COUNTY FISCAL COURT
and RAY HAMMONDS, Judge-Executive,
and ARNETT METCALF, County Treasurer,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

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QUESTIONS PRESENTED

1. By reversing the judgment of Garrard Circuit Court and then ruling that the treasurers of the counties of Kentucky are excepted from decisions of the Supreme Court of the United States forbidding political patronage, has the Kentucky Court of Appeals thereby reversed the Supreme Court of the United States and sanctioned an unconstitutional patronage practice?

2. Was petitioner replaced as treasurer and as tax administrator of Garrard County, Kentucky, by a coercive process and a retributive motive (now sanctioned by the Kentucky Court of Appeals) that are repugnant to the equal protection clause of the Fourteenth Amendment to the United States Constitution?

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PETITION FOR A WRIT OF CERTIORARI
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COURT OF APPEALS

The petitioner Harold Layton respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Commonwealth of Kentucky Court of Appeals, entered in the above-entitled proceeding on May 1, 1992.

OPINIONS BELOW

The opinion of the Commonwealth of Kentucky Court of Appeals is to be reported and is reprinted in appendix hereto, p. 3a, *infra*.

The summary judgment and oral opinion of Garrard Circuit Court (Jackson, R. J.) have not been reported. The summary

judgment for petitioner is reprinted in appendix hereto, p. 11a, *infra*. The oral opinion is reprinted in the appendix hereto, p. 17a, *infra*.

JURISDICTION

Invoking U.S. Constitutional Amendments 1 and 14, *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), and other authorities (see Trial Record, 7-9), petitioner brought suit on 3 July 1990 in Commonwealth of Kentucky Garrard Circuit Court (13th Judicial District). On December 14, 1990, Garrard Circuit Court granted summary judgment to petitioner, including reinstatement as treasurer and tax administrator of Garrard County Kentucky. See p. 11a, *infra*.

On respondent's appeal, the Commonwealth of Kentucky Court of Appeals on May 1, 1992, reversed Garrard Circuit Court and remanded with directions to dismiss the complaint for failing to state a valid claim for relief under rulings of the Supreme Court of the United States. See p. 3a, *infra*. Petitioner's motion for rehearing was denied on June 19, 1992 (p. 2a, *infra*).

Petitioner's motion for discretionary review by the Supreme Court of Kentucky was denied on December 9, 1992 (p. 1a, *infra*).

The jurisdiction of this Court to review the judgment of the Kentucky Court of Appeals is invoked under 28 U.S.C. §1257(a) and Rule 10.1(c) of the Supreme Court of the United States.

PRINCIPAL STATUTE INVOLVED

Kentucky Revised Statute (KRS) 68.020.

County Treasurer – Duties and Powers.

(1) The county treasurer shall receive and receipt for all money due the county from its collecting officers or from any other person whose duty it is to pay money in such manner and for such purpose *as may be authorized by appropriate authority of the fiscal court.* He shall not disburse any money received by him for any purpose other than that for which it was collected and paid over to him, and when he pays out money he shall take a receipt therefor. All warrants for the payments of funds from the county treasury shall be co-signed by the county treasurer and the county judge/executive.

(2) He may, and *when directed by the fiscal court shall*, invest the funds of the county pursuant to KRS 66.480.

(3) He may, and *when directed by the fiscal court shall*, institute actions in the name of the county against all delinquent sheriffs or collectors of the county, and against anyone having money belonging to the county who fails or refuses to pay it over on demand when due. He shall keep a record of all actions *he is directed to institute* on behalf of the county, showing their condition and the money collected thereunder.

(4) He shall keep an accurate detailed account of all money received and disbursed by him for the county, and shall keep books of accounts of the financial transactions of the county *in the manner required by the uniform system of accounting prescribed by the state local finance officer.*

(5) The county treasurer shall, *when required by the fiscal*

court, settle his accounts as county treasurer, and within thirty (30) days after the close of each fiscal year, he shall, unless his immediate predecessor has done so, make a full and complete settlement for the preceding fiscal year with the fiscal court or with a person or persons whom by the fiscal court, by order of record, appoints to make settlement with him. In case of a vacancy, the county judge/executive shall call a special meeting which shall proceed in the manner it deems proper to settle the accounts of the county treasurer. [Emphasis added by petitioner.]

STATEMENT OF THE CASE

I. Petitioner Hired

In 1984 petitioner Harold Layton was appointed treasurer of Garrard County, Kentucky, by Garrard Fiscal Court, on the basis of qualifications, as one of *two applicants* for the part-time position, vacated by resignation of the previous treasurer. Petitioner Layton was reappointed as treasurer in June 1986 and his four-year term, under Kentucky Revised Statute (KRS) 68.010, expired on 30 June 1990.

According to evidence presented by petitioner, the position of treasurer had not been politicized in Garrard County prior to 1990, and reappointment of willing incumbents had been routine (see Trial Record (TR) 86-87, 137-144, 150-161). No evidence to the contrary was ever produced.

In addition to the position of treasurer, petitioner was also hired by Garrard Fiscal Court as occupational tax administrator for Garrard County on 10 July 1986, when the tax was

first established under a local ordinance. Petitioner was hired because he was already bonded and because the Fiscal Court sought a person of integrity. This position, also part-time, was accorded a separate salary.

II. Petitioner Replaced

On 4 January 1990 newly-elected respondent Garrard Fiscal Court conducted the first session of its four-year term at a special called meeting. Newly-elected respondent County Judge-Executive Ray Hammonds, without any prior public notice, nominated respondent Arnett Metcalf for county treasurer, term to begin effective 1 July 1990, or upon resignation of petitioner. When challenged by magistrate Lane, respondent Hammonds replied "the code manual says, the judge submits them and the court *must* approve them" (newspaper transcript, TR 384, emphasis added). Any member of the Fiscal Court may nominate the county treasurer according to Kentucky Office of the Attorney General opinion (OAG) 83-475, and magistrates are not required to approve a particular nominee. Four of five magistrates voted to appoint Metcalf; Lane abstained.

The January appointment of respondent Metcalf violated KRS 68.010, which stipulates that the appointment of treasurer, starting in 1982, is to be made every four years by the fiscal court in its *June* term.

The minutes of the January meeting are silent regarding the hiring of respondent Metcalf as tax administrator, but respondents claim that it was understood that respondent Metcalf would also serve in that capacity, as the duties of tax administrator are "customarily" vested in the county treasurer.

According to petitioner's sworn testimony, on 27 June 1990, in a private meeting, Republican respondent Hammonds told Republican petitioner Layton that Layton was not reappointed because Hammonds was "under a lot of pressure from outside sources to get rid of anybody connected with the Laytons" (TR 127, p. 27a, *infra*). At that time, respondent Hammonds cited the activities of petitioner's brother and nephew in opposing respondent Hammonds in the Republican primary. (At no time did petitioner Layton take part in the political factionalism or publicly express any political views.) Respondent Hammonds further indicated that he had nothing against Layton personally, and that *Layton was his second choice* if respondent Metcalf "did not work out." Respondent Hammonds has never denied this meeting as represented by petitioner.

On June 28, 1990, petitioner appeared before an official meeting of Garrard Fiscal Court and objected to his replacement, giving written notice to respondent Garrard Fiscal Court that he expected to continue as treasurer and occupational tax administrator under U.S. Supreme Court decisions forbidding patronage hirings and dismissals. (No Kentucky statute prohibits the reappointment of an incumbent county treasurer, and the ordinance creating the position of tax administrator specifies no fixed term.)

At that same meeting respondent Hammonds, knowing that petitioner held a full-time position as a loan officer, gave a rationale for petitioner's replacement, never before mentioned in public: "it would be more convenient if the position [of treasurer] was full-time" (newspaper transcript, TR 387).

Garrard Fiscal Court deferred petitioner's objection to

County Attorney Mark Metcalf to research, until the July 10th meeting of the Fiscal Court. However, on 29 June 1990, County Attorney Metcalf gave written notice to petitioner Layton that he was "directed by Fiscal Court to provide you notice that Arnett Metcalf has been appointed to succeed" petitioner Layton effective 1 July 1990, both as treasurer *and as county tax administrator*.

III. Litigation in Garrard Circuit Court

Invoking U.S. Constitutional Amendments 1 and 14 and *Rutan v. Republican Party of Illinois*, 427 U.S. 62 (1990), petitioner brought suit on 3 July 1990 in Commonwealth of Kentucky Garrard Circuit Court (13th Judicial District). Through counsel petitioner charged that his replacement, under *Rutan*, was an unconstitutional patronage practice. (Throughout litigation in Kentucky, petitioner was represented by Dean, Dean, & Dean; respondents were represented by Garrard County Attorney Mark Metcalf.)

In answer to interrogatories, respondents admitted that "the hiring of Arnett Metcalf is a patronage hiring and the dismissal of Harold Layton is a patronage dismissal." Respondents further admitted that petitioner Layton "fully and faithfully served and performed in the position as County Treasurer and County Occupational Tax Administrator." However respondents maintained that the petitioner occupied a "high-level" position exempt from U.S. Supreme Court rulings forbidding patronage and that, in any case, petitioner held office pursuant to a state statute mandating a four-year term.

In his brief for Garrard Circuit Court, petitioner, citing the specific duties of KRS 68.020 (p. 3, *supra*), argued directly from the criteria advanced in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), that petitioner occupied a nonpolicymaking, nonconfidential position, and that, in any case, political affiliation was not an appropriate requirement for the public office involved. According to *Elrod*, 427 U.S. 347, 369, the burden is on the government to show that a position falls outside these criteria, cases of doubt being decided in favor of the employee.

Petitioner argued that his posts had "very limited and well-defined objectives" and were "narrow in scope"; and that neither he nor "any of his predecessors ever formulated plans for the implementation of broad policy" nor advised the County Judge-Executive or Fiscal Court, as under KRS 69.210 that is the obligation and duty of the county attorney. Further the only confidential materials in petitioner's custody were the records of individual tax holders, but that makes it desirable that the position not be politicized. In any case, such materials are not politically sensitive.

If the responsibilities fell within the criteria of *Elrod* and *Branti*, petitioner argued that a patronage appointment (as treasurer) and hiring (as tax administrator) of Arnett Metcalf were contrary to the holding of *Rutan*, which forbids patronage hirings. Citing *Perry v. Sindermann*, 408 U.S. 593, 596-598, (1972), petitioner argued that his lack of tenure right to the positions he occupied could not be used to deny his overriding constitutional rights. Petitioner reasoned that, based on the motive of respondents, and on petitioner's qualifications,

petitioner had, in this case, a "preference" to be reappointed.

Petitioner also argued that he was "being dismissed *because of what his relatives did* and that respondents "should not be allowed to concoct a defense of compelling or vital government interest . . . when the sole, ulterior motive and purpose was to make all Laytons open season."

Respondents essentially made two arguments:

(1) The position of treasurer is a "high-level" appointment falling "outside that class of office holders whose tenure cannot be conditioned on political affiliation." The petitioner, according to respondents, assumed a "vital role" in county affairs, with "inherent discretion and responsibility to exercise judgment", an "implied . . . obligation to recommend . . . types of investment", with discretion to "advise the [fiscal] court regarding those against whom suit should be brought" for failure to meet obligations to the county. Respondents further argued that the treasurer is "privy to confidential and sensitive information", which respondents left unspecified.

(2) Respondents claimed that Garrard Circuit Court was without jurisdiction to disturb Kentucky statutes and constitutional provisions stipulating a four-year term for county treasurers. Respondents argued that a ruling for petitioner would render the office of treasurer a "lifetime sinecure", thus violating Kentucky constitutional provision §23:

> The General Assembly shall not grant any title of nobility or hereditary distinction, nor create any office, the appointment of which shall be longer than a term of years.

Respondents argued that, to reinstate petitioner, the Court must find some provisions of the Kentucky Constitution in violation of the United States Constitution.

Garrard Circuit court, following the precise language of *Elrod* determined that, under the explicit and detailed language of KRS 68.020, petitioner, as treasurer, occupied a non-policymaking, non-confidential position (oral opinion, pp. 17a-26a, *infra*). The Circuit Court noted that the treasurer has "limited duties" that "are controlled by statute" and that are "subject to the control of the Fiscal Court."

The Circuit Court *emphasized* that the treasurer does not serve on the personal staff of the County Judge-Executive, but serves the politically heterogeneous Fiscal Court, as a whole, distinguishing this case from those cited by petitioner involving mayoral appointees. The Court found that the records in the position of the treasurer were public records and that there was nothing in the law requiring the treasurer to be a confidential employee. The Circuit Court acknowledged that petitioner had "no right to continue", but noted that the burden was on the government to show that political affiliation was "necessary to perform the job."

The Circuit Court found that respondent Metcalf had been appointed treasurer for a motive impermissible under *Rutan*, and, therefore the Court reinstated petitioner. The Circuit Court found no inconsistency between its ruling, in this instance, and with Kentucky statues and constitutional provisions. The issue was not whether the fiscal court, under Kentucky law and under usual circumstances, had the right to make an appointment, for certainly it reserved that right; the issue

was whether the appointment could be made *solely* for the patronage motivation admitted by respondents, and still be in compliance with *Rutan*, and the Circuit Court found that it could not. The judge concluded, "A nonpolicymaking, nonconfidential employee may be be discharged from a job he is satisfactorily performing on the sole ground of his political belief" (p. 24a, *infra*).

On December 14, 1990, Garrard Circuit Court granted summary judgment to petitioner, including reinstatement as treasurer and tax administrator (p. 11a, *infra*).

After Garrard Circuit Court ruled in favor of petitioner Layton, respondents sought a new trial, in part on the basis that Layton had been dismissed as tax administrator when the occupational tax was repealed on July 1, 1989. In support of this purported dismissal, respondent Hammonds offered a manifestly false affidavit (TR 279-280). Petitioner submitted overwhelming documentary evidence that petitioner continued to serve, and be compensated, after the tax was repealed, collecting taxes payable through April 1990 and delinquent taxes through 30 June 1990. Respondent Hammonds submitted a new affidavit revoking his false claim (TR 414–415).

In responding to this claim, petitioner entered evidence of irregularities by respondents into the record (TR 281–396), including evidence showing that Garrard Fiscal Court at no time abolished the position of tax administrator, dismissed petitioner as tax administrator (as is clear from respondents' error, above), or hired another in his place (TR 298–308); and evidence that the appointment of respondent Metcalf as treasurer was tainted through the manipulation of two of five Fis-

cal Court magistrates, who gave sworn testimony that they believed that petitioner "Layton was going to resign" voluntarily and would have voted to retain petitioner otherwise (TR 395–396). Respondents deny wrongdoing, citing only a misunderstanding.

In an order dated 15 January 1991, Garrard Circuit Court denied respondents' motion for a new trial (p. 9a, *infra*).

IV. Litigation in Kentucky Court of Appeals

By right, respondents appealed the decision of Garrard Circuit Court to the Kentucky Court of Appeals. The arguments of both respondents and petitioner closely followed those delivered in Garrard Circuit Court. The Court of Appeals accepted the Circuit Court's findings of fact but rejected its ruling for petitioner. Instead it accepted respondents' arguments (1) and (2) summarized above. On May 1, 1992, the Commonwealth of Kentucky Court of Appeals reversed Garrard Circuit Court and remanded with directions to dismiss the complaint for failing to state a valid claim for relief under rulings of the Supreme Court of the United States (p. 3a, *infra*).

Petitioner sought rehearing in the Court of Appeals, arguing that the Court had assumed what it had the burden to prove, by uncritically accepting and repeating the "*unsubstantiated pronouncements* of respondents rather than reviewing the *express duties of the Treasurer as stipulated by statute.*"

Petitioner's motion for rehearing was denied on June 19, 1992 (p. 2a, *infra*). Petitioner's motion for discretionary review by the Supreme Court of Kentucky was denied on December 9, 1992 (p. 1a, *infra*).

On 31 July 1992 respondent Arnett Metcalf resigned as treasurer and tax administrator. Louise Robinson was appointed to replace him.

REASONS FOR GRANTING THE WRIT

I.

The ruling by the Kentucky Court of Appeals provides a model by which Kentucky and every other state may evade a judgment of the Supreme Court of the United States, as if no such judgment were ever issued by it.

Petitioner will argue below that the decision by the Kentucky Court of Appeals is a transparent attempt to evade the mandate of the U.S. Supreme Court Rulings, by a shifting of language and criteria. Petitioner will also argue that the Kentucky Court of Appeals is mistaken in holding that the legislative construction of the office of treasurer supersedes petitioner's claim that he was replaced for a reason impermissible under U. S. Supreme Court Rulings forbidding patronage.

Petitioner believes that this case offers to this honorable Supreme Court the opportunity to issue an explicit prohibition against lower courts using artifice and the shifting of grounds to evade its clear intent.

In an article in the *Lexington Herald-Leader*, appearing on 22 June 1990, Mr. Jack Brammer, after interviewing current and former officials in state and local Kentucky government, prophetically concluded that "Political patronage is so

engrained in Kentucky government that even a U.S. Supreme Court decision might not be powerful enough to eliminate it." The ruling of the Kentucky Court of Appeals, if allowed to stand, effectively, and officially, emasculates U. S. Supreme Court rulings prohibiting political patronage. For not only does it render the treasurers of the 120 counties of Kentucky subject to politically-motivated replacement, it also provides a model case, to be studied closely by powerful political interests striving to maintain undue influence over local and state governments, in Kentucky and in other states. The language and tactics employed by respondents will be emulated, and the criteria mistakenly adopted will be liberally applied to other ministerial positions having less specific statutory specification than those of petitioner. And the course taken by this case will discourage wronged parties from seeking due redress.

Petitioner believes that, had he sought relief in federal court, the outcome would have very likely been different. Whenever federal law impacts established practices at the state or local level, there is a habitual tendency of all three branches of government at that level to circumvent and out-maneuver the thrust and effect of that federal law. A common method of this evasion is to harness the English language to provide shades of meaning or schemes of wording which mask and cloud the plain meaning and certain thrust of the federal mandate. State judicial authority can be just as culpable of this practice as the most entrenched bureaucrat or partisan politician. And, in many cases, the state judiciary, which is elected, does this as a matter of course to preserve its own authority, retain any possible political prerogatives, and protect its political allies outside

of federal jurisdiction (e.g., consider the civil rights struggle).

Petitioner will now summarize the evidence that the ruling of the Kentucky Court of Appeals is erroneous.

(1) Petitioner and Garrard Circuit Court (pp. 17a–26a, *infra*) relied on the *plain meaning* and explicit criteria of *Elrod v. Burns* and *Branti v. Finkel.* In contrast, respondents and Kentucky Court of Appeals adopted language that shifted the criteria for determining whether a position falls within the protections of *Elrod* and *Branti.*

Based on *Elrod* 427 U.S. 347, 368-369, the critical analysis concerns "The nature of the responsibilities". And while "nonpolicymaking individuals usually have limited responsibilities", they may sometimes have "many responsibilities" with "only limited and well-defined objectives." Further, "Consideration should also be given to whether the employee acts as an advisor or formulates plans for long-range goals." A "nonpolicymaking, nonconfidential employee" cannot be discharged from a job that he is satisfactorily performing on the sole ground of his political beliefs (*Elrod* 427 U.S. 347, 376).

According to *Branti* 445 U.S. 507, 519, however, even a policymaking employee may not be discharged if the employee's duties do not meet the "ultimate inquiry":

> . . . the ultimate inquiry is . . . whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved . . . since party affiliation is not necessarily relevant to every policymaking or confidential position.

Ignoring these explicitly specified criteria, the Court of Appeals adopted language of respondents, asserting, "The critical analysis concerns the inherent duties, the scope of authority and the responsibility of the position in question and whether or not it is a policy-making position or not" (p. 5a,*infra*). So at the outset, the criterion of "policy-making" has almost become an afterthought. Also, the court used other vague, diffuse, and confusing language injected by respondents, calling the position of treasurer a "high-level one of import and vital function." This shift in language helped give this holding a veneer of plausibility and an air of respectability to which it was not entitled.

(2) Petitioner and Garrard Circuit Court adhered to the explicit stipulations of KRS 68.020, giving duties of the treasurer, while in the ruling of the Court of Appeals, **KRS 68.020 is never quoted, never cited, never mentioned**, except in the words, " the statutes continue to set forth the duties, powers, and responsibilities . . ." (p. 6a, *infra*). What more facile device for the appellate court to reach a wrong conclusion than to reason without noticing the most important applicable Kentucky statute?

The duties specified by KRS 68.020 (with perhaps one exception, investing, discussed below) are routine accounting and bill collecting procedures, no different, perhaps, that those carried out by tens of thousands of federal civil service employees working, say for the IRS. The treasurer's duties are all subject to the express direction of the fiscal court.

Strictly speaking, not a single duty specified by KRS 68.020 is mentioned in the ruling by the Court of Appeals. The most

specific duty ascribed to the treasurer by that Court is the "discretion to advise the judge-executive with regard to financial matters, but not limited to, the investment of funds, the filing of suit, and collection methods to utilize." This "discretion to advise *the judge-executive*" is nowhere mentioned in KRS 68.020, and, in any event, the statute clearly asserts that the treasurer serves the (politically heterogeneous) fiscal court as a whole, and not merely, nor primarily, the judge-executive.

A careful examination of state statutes reveals that they provide for a strict separation of fiscal policymaking from the ministerial and technical duties of the treasurer, as is proper for a servant of the politically heterogeneous fiscal court (KRS 67.080, 67.710, 68.240).

For suppose the position of treasurer is as respondents have claimed. To whom does the treasurer owe allegiance? Does the treasurer serve one faction of the fiscal Court, to the exclusion of another? Does the treasurer help shape the policy of the judge-executive? Or of those in his political party? Or of a transiently controlling faction? Does the treasurer conceal fiscal information from one faction or another? Does the treasurer owe special loyalty to the one who nominated him, or to those who voted to appoint him?

Kentucky statutes KRS 68.240 (1) and KRS 67.710 (5) assert that the county judge-executive prepares and submits the annual budget and keeps the "fiscal court fully advised as to the financial condition and needs of the county . . ." OAG 80-344 asserts that " . . . the fiscal affairs of the county, including the final adoption of the budget, are squarely on the shoulders of the fiscal court as a body . . ." There is no mention in

state law of a role for the treasurer in the preparation of the county budget or in advising (as distinguished from informing) the fiscal court.

The strongest argument that respondents can offer involves the investing of funds, under KRS 68.020 (2) and KRS 66.480, which provides that investment authority may be delegated to the treasurer. But the choices for instruments of investment are strictly circumscribed in KRS 66.480, and petitioner believes that there is no compelling argument that political affiliation or association is an appropriate requirement for this permissive and revocable authority under the express control of the politically heterogeneous fiscal court.

Moreover, the wording of KRS 67.080, speaking of the treasurer, says that the fiscal court is to "employ a competent person to keep . . . accounts and records" and "pay such person a reasonable compensation for such services". Is this "competent person" a "high-level" political appointee?

(3) As pointed out by the Circuit Court (p. 22a, *infra*), respondent's claim that the positions held by the petitioner have "inherent duties" not specified by statute that except it from the protection of rulings forbidding patronage was based on cases that are *distinguishable* from this one, because the treasurer has explicit duties by law and does not serve on the personal staff of the county-judge executive. Yet respondents still sought to buttress their arguments with these cases, on which the appellate court's decision implicitly depends (p. 24, respondents' brief for the Kentucky State of Appeals).

In particular, respondents relied heavily on *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990). City At-

torney Williams, however, had *no specified duties* and a documented history of adversarial relations with the mayor. Following precedents involving government attorneys, the 6th Circuit Court held that the relationship of Williams to the mayor was an attorney-client relationship, and thus Williams was a confidential employee. (*Ness v. Marshall*, 660 F.2d 517 (3d Cir. 1981) and *Meeks v. Grimes* 779 F.2d 417 (7th Cir. 1985), also cited by respondents, are similarly distinguishable.)

(4) Among the most curious aspects of the ruling is its urgent defense of the four-year appointive term of the treasurer. *Why is the ruling so concerned about this technical point which is surely rendered moot by the emphatic holding that petitioner is excepted from the rulings forbidding patronage?* And why does the Court *caricature* petitioner's position, and create a straw man, asserting "At issue is whether the reasoning of the United States Supreme Court rulings . . . mandate that Layton be continually reappointed to the position of county treasurer and occupational tax administrator until such time as there is just cause for his removal or he resigns" ? It must be because the Court knew that its holding based on the duties was weak, and it sought to shore it up with general provisions of state law.

Under KRS 68.010, the treasurer serves a four-year term, with "neglect of duty, incompetency, or dishonesty" the only grounds for removal during the treasurer's term. (This implies that industry, competence, and honesty should be the most important criteria in the treasurer's selection.)

It is clear from petitioner's initial letter to Garrard Fiscal Court that petitioner makes no claim to a tenure right, for he acknowledged that there was "no obligation to continue my

employment, even though such continuity was routine in previous administrations." At that time, however, petitioner cited *Branti v. Finkel*, 445 U.S. 507 at 513, fn. 6:

> After *Elrod*, it is clear that the lack of reasonable expectation of continued employment is not sufficient to justify a dismissal based solely on an employee's private political beliefs.

Respondents have argued, and petitioner concurs, that after the expiration of his term as treasurer, petitioner had no right to continue as treasurer. However, surely the petitioner, at the expiration of his term, *should re-enter the pool of potential appointees.* If the position of treasurer falls under the criteria of *Elrod*, or of *Branti*, then the fiscal court cannot make a patronage appointment. Foremost among the remaining reasonable criteria are the qualifications of industry, competence, and honesty.

In the instant case, however, petitioner, the most qualified candidate, was singled out, and coercively excluded from consideration, for an ulterior motive, and another was nominated, for an impermissible reason, and appointed.

The Circuit Court found this appointment illegal, under *Rutan*, and based on petitioner's undisputed qualifications and respondents' admission that "the dismissal of Harold Layton is a patronage dismissal", the Court found that petitioner, in this instance, had as he claimed, a "preference", to continue.

This appears consistent with the reasoning of Justice Stevens in *Illinois State Employees Union, Etc., v. Lewis*, 473 F.2d 561 (7th Cir. 1992), cert. denied, 410 U.S. 928 (1973),

who stated

> There is a clear distinction between the grant of tenure to an employee—a right which cannot be conferred by judicial fiat—and the prohibition of a discharge for a particular impermissible reason. The Supreme Court has plainly identified that distinction on many occasions, most recently in *Perry v. Sindermann*, 408 U. S. 593 (1972).
>
> Unlike a civil service system, the Fourteenth Amendment to the Constitution does not provide job security, as such, to public employees. If however, a discharge is motivated by considerations of race, religion, or punishment of constitutionally protected conduct, it is well settled that the State's action is subject to federal judicial review. There is no merit to the argument that recognition of plaintiff's constitutional claim would be tantamount to foisting a civil service code upon the state. (473 F.2d.,at 567-568).

Similar to Governor Thompson's practice in *Rutan*, where the artifice of a selective hiring freeze was used to cover an unconstitutional patronage practice, respondents have used the power to appoint as a cover for an unconstitutional practice. What they could not command directly, the immediate replacement of petitioner by respondent Metcalf, they achieved indirectly. The *Rutan* line relies in part on *Bailey v. Alabama*, 219 U.S. 219, 239 (1911), which asserts

> It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means to escape from constitutional restriction. And the State may not in this way interfere with matters withdrawn from its authority by the Federal constitution . . .

(5) This ruling has other curious features:

(a) Following respondents, the Court speaks of unspecified confidential materials in the possession of the treasurer, but under KRS 61.870, 61.872, and 61.874, and from OAG 79-374, 82-91, and 82-394, it is clear that the treasurer's records are open for public inspection at all times.

(b) The ruling fails to distinguish the tax administrator as a separate position, constructed under a separate statute, with distinct duties, with a separate salary, and with no statutory term. (If certiorari is granted, petitioner preserves the right to make arguments based on the local ordinance stating the duties of the tax administrator.)

(c) The ruling completely ignores the opinion of the lower Court, as indeed it must, for the reasoning of the lower Court, point by point, demolishes the disjointed and distorted decision of the appellate court.

(d) The ruling is illogical. Under KRS 68.010, the treasurer's term does not coincide with that of the judge-executive or the fiscal court, rather the term begins six months later. If it is essential for the treasurer to be in political confidentiality or

for the treasurer to participate in policy-making, the treasurer can not be required to meet those duties during the politically crucial first six months of the term of the fiscal court. And if the make-up of the fiscal court changes, by natural political shifts or by replacement, or if the treasurer changes in political loyalty, there can be no replacement of the treasurer until the expiration of his term.

(e) The appellate justices had reservations of conscience, as one of their closing statements reveals (p. 8a, *infra*):

> Our natural sense of justice does not prevail in this dispute. We do not think that Layton was anything but a competent, hardworking public official. His failure to be reappointed runs against the grain of our work-ethic sensibilities that full and faithful service and performance should be correspondingly rewarded.

Thus, the Kentucky Court of Appeals shifted the criteria, aggrandized the position of treasurer, ignored the statutory duties, implicitly relied on distinguishable cases, escaped the intent of federal law by a legislative presumption, ignored Kentucky open record laws, and ignored the lower court's ruling. These errors reveal the ruling for what it really is: **a transparent attempt to reach a foreordained conclusion—contrary to both law and logic—which protects the political forces of Kentucky from the restraints recently imposed under *Rutan*.**

II.

The Kentucky Court of Appeals has sanctioned a process and legitimized a motive for appointment to public office which will now encourage unprincipled elected officials to violate without fear and trample without restraint the rights of current and prospective public employees, and which will, in turn, erode the foundations of democratic government by undermining its credibility and integrity.

Petitioner submits that the ruling of the Kentucky Court of Appeals, made in full knowledge of evidence for respondents' misconduct, gives license to behavior that, going far beyond simple patronage, uses the authority and powers vested in political office and the cover of law to manipulate the hiring and discharge of public employees, and to do so for motives that strike at the foundations of democratic process.

Petitioner readily acknowledges that no citizen has a *right* to public employment, to appointive office, or to elective office. But under the equal protection clause of the Fourteenth Amendment, petitioner believes that every qualified citizen seeking such position has a *right to a process of consideration or selection* that is consistent with applicable laws and free of manipulation, sleight of hand, and ulterior motives by those who regulate the position.

Petitioner had no right to continue. But respondent Hammonds had *no right* to manipulate the appointive process, es-

pecially for the retributive motive he stated to petitioner on 27 June 1990. And certainly respondent Metcalf had *no more right* to the positions than did petitioner.

No court has taken explicit note of petitioner's documentation of respondents' alleged misconduct, but from the initial complaint, and brief for Garrard Circuit Court, petitioner has cited and documented irregularities, which have been recapitulated for each court, and hence preserved.

In particular, petitioner cites three salient instances of official misconduct:

(1) Respondent Hammonds coerced and manipulated the appointment of respondent Metcalf six months before the legally stipulated June term (pp. 5, 11-12, *supra*). He thus foreclosed the process of consideration that would have ordinarily ensued before a legitimate appointment in June.

(2) Petitioner Layton was replaced as tax administrator by sleight of hand. Respondent Hammonds falsely claimed that petitioner ceased to serve as tax administrator when the tax had been repealed in July 1989. Respondent Garrard Fiscal Court could not have hired a replacement at the January 4, 1990 session, since the tax was not reinstated by the Fiscal Court until February 1990 (pp. 5, 11, *supra*). And respondent Garrard Fiscal Court failed to dismiss petitioner or hire another after the tax was re-imposed.

(3) Petitioner was dismissed for a private motive: to appease respondent Hammonds' supporters in their quest to exact retribution on petitioner's relatives (p. 6, *supra*; p. 27a, *infra*). This motive sullied the democratic process rather than serving the public interest.

Petitioner believes that, *whatever the nature of the position of treasurer, the political activities of one's relatives is an unreasonable and unjust criterion for determining one's fitness for the office.* For, like race, gender, and nationality, one's family connections are beyond one's control. Furthermore, conditioning public employment on family connections tends to circumscribe the freedom of expression of one's relatives.

Just as respondents could not, under the Fourteenth Amendment, adopt a "regulation providing that no Republican, Jew, or Negro shall be appointed to . . . office . . ." (*United Public Workers v. Mitchell* 330 U.S. 75, 100 (1947); §42 U.S.C. §2000 e-2 (a) (1))), respondent Hammonds should not be allowed to adopt a principle for hiring that excludes those connected with the Layton family.

Petitioner believes that respondent Hammonds, in action now sanctioned by the Kentucky Court of Appeals, *misused* the power vested in him by the state of Kentucky, and *under the color of law* acted in violation of the Fourteenth Amendment. According to 42 U.S.C. §1983,

> Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State . . . who subjects . . . any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The traditional definition of "taken under the color of law", upheld as recently as 1988 (*West v. Atkins*, 487 U.S. 42, 49)

was given in *United States v. Classic* 313 U.S. 299, 326 (1941):

> Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action "taken under the color of" state law.

We can only wonder how the Court of Appeals would have ruled if petitioner (who is white) were instead an African-American and had charged that he had been replaced solely on the basis of his race. Suppose that respondent Hammonds had said to petitioner "Harold you have done a good job, but because the black people opposed me in the primary I am under a lot a pressure to get rid of anyone who is black." Would the Court of Appeals have been so anxious to defend the actions of respondents under a four-year term or under general provisions of the Kentucky Constitution?

Despite thorough documentation of misconduct, respondents, through counsel, have routinely suggested that that petitioner's charges are irrelevant, unimportant, or false. For example, on page 2 of respondents' answer to petitioner's Motion for Discretionary Review before the Kentucky Supreme Court, respondents portray unspecified charges of misconduct as "embellishments" and assert that they cannot admit to them "in good faith." Then, on page 17 of that document, respondents deny that the retributive motive stated by respondent Hammonds on 27 June 1990 is the actual reason for petitioner's replacement, yet they do not deny that the meeting took place, nor do they deny, there or elsewhere, the statements that petitioner attributes to respondent Hammonds.

In a system that strives to protect the rights of all, even those least deserving, should not this honorable Supreme Court act to protect the rights of one who faithfully and honorably served Garrard County, only to be rewarded by a coercive and retributive dismissal because one member of the appointing authority was under pressure to get rid of anybody connected to the Laytons?

CONCLUSION

For these various reasons, this petition for certiorari should be granted. If Petitioner is correct that the Kentucky Court of Appeals has sanctioned an unconstitutional patronage practice, the ruling of that court should be reversed.

Respectfully submitted,

HAROLD LAYTON
413 Danville Street
Lancaster, KY 40444
(606) 792-2562

APPENDIX

Supreme Court of Kentucky

92-SC-515-D

(91-CA-104-MR)

HAROLD LAYTON, MOVANT

V.

GARRARD COUNTY FISCAL COURT, ET AL.

RESPONDENTS

GARRARD CIRCUIT COURT

90-CI-83

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED December 9, 1992.

/s/ Robert F Stephens

Chief Justice

Commonwealth of Kentucky

Court of Appeals

NO. 91-CA-104-MR

GARRARD COUNTY FISCAL COURT;
RAY HAMMONDS, Judge-Executive;
and ARNETT METCALF, County Treasurer
APPELLANTS

V.

HAROLD LAYTON, APPELLEE

ORDER DENYING PETITION FOR REHEARING

****

BEFORE: GUDGEL, HUDDLESTON, and McDONALD, Judges.

GUDGEL, JUDGE: The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

ENTERED: June, 12 1992

/s/ Paul D. Gudgel
JUDGE, COURT OF APPEALS

RENDERED: May 1, 1992; 3:00 p.m.
TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals
No. 91-CA-104-MR

GARRARD COUNTY FISCAL COURT
and RAY HAMMONDS, Judge-Executive,
and ARNETT METCALF, County Treasurer
APPELLANTS

v.

HAROLD LAYTON
APPELLEE

APPEAL FROM GARRARD CIRCUIT COURT
HONORABLE ROBERT J. JACKSON, JUDGE
ACTION NO. 90-CI-083

REVERSING

* * * * *

BEFORE: GUDGEL, HUDDLESTON and McDONALD, Judges.

McDONALD, JUDGE. Garrard County Fiscal Court, Ray Hammonds (Judge-Executive) and Arnett Metcalf appeal from the Order of the Garrard Circuit Court which granted summary judgment in favor of appellee, Harold Layton.

The background of this case are straightforward and undisputed. Pursuant to KRS 68.010, Harold Layton was appointed treasurer of Garrard County in 1984 and reappointed to the

position in 1986. His regular term expired on June 30, 1990. At an executive session in January, 1990, Garrard Fiscal Court appointed Arnett Metcalf to be the new county treasurer effective July 1, 1990, or earlier if Layton resigned.

Layton did not resign and on June 28, 1990, he objected to the appointment of Metcalf becoming effective at the expiration of his (Layton's) term. He further expressed that he fully expected to be allowed to continue as county treasurer and occupational tax administrator after his current term.

On June 29, 1990, the Garrard County Attorney officially notified Layton that the Fiscal Court had appointed Arnett Metcalf to succeed him effective July 1, 1990, and that he was to prepare all accounts for Metcalf and make a settlement with the Fiscal Court.

Layton then filed an action in Garrard Circuit Court demanding that he be reinstated as treasurer and occupational tax administrator for Garrard County with full back pay, and that he be allowed to continue in such position until just cause is found for his dismissal or until he resigns.

The trial court concluded that there was no genuine issue of material fact and that Layton was entitled to a judgment as a matter of law. Thus, by orders entered November 17, 1990, and December 17, 1990, the trial court granted summary judgment in favor of Layton and ordered that he be reinstated as county treasurer and occupational tax administrator by reason of his "preference" to the position.

While we agree that the trial court properly determined that there was no genuine issue of material fact, we conclude that the court erroneously determined which party was entitled

to judgment as matter of law.

At issue is whether the reasoning of the United States Supreme Court rulings in *Rutan v. Republican Party of Illinois* ___ U.S. ___ 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990); *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287, 63 L.Ed.2d 574 (1980); and *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), mandate that Layton be continually reappointed to the position of county treasurer and occupational tax administrator until such time as there is just cause for his removal or he resigns.

We have reviewed the *Rutan* line of cases and conclude that the exceptions carved out are applicable to the present case. The opinions clearly do not maintain that *all* forms of patronage appointments are impermissible. In fact, the Court suggests the opposite to be true. It is *not* argued by appellants that the fiscal court my fire and hire at will or may condition a low-level employee's position upon political considerations; such practices are, indeed, deemed unconstitutional. The consideration in the present case is whether an appointed office holder has some "preference" to reappointment after the expiration of his statutorily mandated four-year term.

The critical analysis concerns the inherent duties, the scope of authority and the responsibility of the position in question and whether or not it is a policy-making position or not.

KRS 67.080 provides in pertinent part:

> Powers of the fiscal court. – (1) The fiscal court may:
>
> . . .

(f) Establish all appointive offices, set the duties of those offices, and approve all appointments to those offices . . .

KRS 68.010 provides in pertinent part:

> The fiscal court of each county shall, at its regular June term every four (4) years, appoint a county treasurer for a term of four (4) years . . .

The statutes continue to set forth the powers, duties, and responsibilities of the county treasurer.

In our opinion, the legislative scheme promulgated by the General Assembly is consistent with and serves to carry out the purpose and intent of §§23 and 107 of the Kentucky Constitution.

The Kentucky Constitution provides:

> The General Assembly shall not grant any title of nobility or hereditary distinction, nor create any office, the appointment of which shall be for a longer time than a term of years. Ky. Const. §23.

It provides further:

> The General Assembly may provide for the election or appointment for a term not exceeding four years of such other county or district ministerial and executive officers as may, from time to time, be necessary. Ky. Const. §107.

We conclude that the office at issue is a high-level one of import and vital function. Layton occupied a position with considerable potential for the exercise of authority, confidentiality, and involvement in the development of fiscal policy. The county treasurer retains custody of confidential records and has discretion to advise the judge-executive with regard to financial matters, but not limited to, the investment of funds, the filing of suit, and collection methods to utilize. The office has all the indicia of a "policy-making" government position which vests its holder with discretionary power, considerable responsibility, confidence, and supervisory authority. Therefore, it is our opinion that the appointive process mandated by the statutes applicable to the present case constitutes one of the permissible forms of patronage set forth in the *Rutan* line of cases.

Layton was a high-level officer of county government; his reliance on the *Rutan* line of cases for reversal of the fiscal court's action is misplaced. *Rutan*, *Branti* and *Elrod* concerned: low-level employees seeking promotion or recall to non-policy-making positions; positions of assistant public defenders; and, positions of deputy sheriffs, respectively. Specifically at issue was whether such employees may permissibly be discharged solely for their political affiliation or beliefs. None of the parties held office pursuant to a statute mandating their appointment or a constitutional provision limiting their terms. In our opinion, the United States Supreme Court rulings in *Rutan*, *Branti* and *Elrod* do not apply in favor of appellee, Layton. The decisions do not mandate that the Garrard Fiscal Court reappoint Layton, by reason of "preference" or otherwise, to the office of county treasurer upon the expiration of his four-year term.

Contrary to assertion, the *Rutan* line of cases provides no relief to Layton. In fact, the reasoning and holdings of the opinions support the action of Garrard Fiscal Court. The appointive office at issue in the present case is one we conclude may permissibly be based upon political considerations and affiliations. Our natural sense of justice does not prevail in this dispute. We do not think that Layton was anything but a competent, hardworking public official. His failure to be reappointed runs against the grain of our work-ethic sensibilities that full and faithful service and performance should be correspondingly rewarded.

The refusal of the Garrard Fiscal Court to reappoint Layton and instead make a patronage appointment of Metcalf to the office of county treasurer is consistent with 67.080, KRS 67.083, KRS 68.010, and §§23 and 107 of the Kentucky Constitution. The Fiscal Court's actions did not violate the first or fourteenth amendments to the United States Constitution and are consistent with federal precedent.

For all the foregoing reasons, the judgment of the Garrard Circuit Court is reversed and the trial court is directed to enter summary judgment in favor of appellants, Garrard Fiscal Court, Arnett Metcalf (County Treasurer), and Ray Hammonds (Judge-Executive). ALL CONCUR.

ATTORNEY FOR	ATTORNEYS FOR
APPELLANTS:	APPELLEE:
Mark H. Metcalf	Lee. M. Dean, W. Earl Dean
Garrard County Attorney	Dean, Dean & Dean
Lancaster, KY	Harrodsburg, KY

COMMONWEALTH OF KENTUCKY
13TH JUDICIAL DISTRICT
GARRARD CIRCUIT COURT
NO. 90-CI-083

HAROLD LAYTON
PLAINTIFF
V.
GARRARD COUNTY FISCAL COURT
DEFENDANT

ORDER OVERRULING MOTION FOR
NEW TRIAL OR TO ALTER
AMEND OR VACATE JUDGMENT

******

This matter came on before the Court on January 11, 1991 upon motion by the defendants for a new trial or in the alternative, to alter amend or vacate the judgment; the Court having reviewed the record and having found this court has theretofore, on November 9, 1990, sustained plaintiff's motion for a summary judgment; and having reaffirmed that summary judgment on December 14, 1990; and the Court being otherwise sufficiently advised, it is hereby ORDERED that this new motion for a new trial or in the alternative, to alter, amend or vacate is OVERRULED.

ORDERED this 15th day of January, 1990.

/s/ ROBERT J. JACKSON
CIRCUIT JUDGE

NOTICE OF ENTRY REQUIRED:

CR 77.04

DISTRIBUTION

Hon. Earl Dean;

Hon. Mark Metcalf

/s/ Fred Simpson Jr RC/DC

CIRCUIT COURT CLERK

COMMONWEALTH OF KENTUCKY
13TH JUDICIAL DISTRICT
GARRARD CIRCUIT COURT
NO. 90-CI-083

HAROLD LAYTON
PLAINTIFF
V.
GARRARD FISCAL COURT, ET AL.
DEFENDANTS

SUMMARY JUDGMENT FOR PLAINTIFF

******

This matter came before the Court December 14, 1990, in regard to the granting of a summary judgment for the plaintiff; appearing in open court was the Honorable Earl and Lee Dean, for the plaintiff; appearing on behalf of the defendants was the Honorable Mark Metcalf; and the Court having directed the official reporter to report the proceeding, did hear arguments, review the record; and being otherwise sufficiently advised, does hereby ORDER as follows:

That this Court's Ruling and Order dated November, 15, 1990, entered and noted of record November 17, 1990, is AFFIRMED. That this Court's granting of summary judgment to the plaintiff, Harold Layton, shall be in accordance with his prayer for relief set forth in his pleadings; specifically said prayer requesting that plaintiff, Harold Layton, be immediately reinstated as County Treasurer and County Occupational Tax

Administrator for Garrard County, Kentucky, with full back pay, to continue in such position by reason of his preference, thereto, under the United States Supreme Court rulings and for any other relief to which he is entitled.

IT IS HEREBY ORDERED AND ADJUDGED that the plaintiff, Harold Layton, be, and hereby is, immediately reinstated as County Treasurer and County Tax Administrator for Garrard County Kentucky, with full back pay, to continue in such position by reason of his preference, thereto, under the United States Supreme Court rulings, and that such reinstatement be on the same basis he was employed prior to his wrongful removal and at the same salary increase recently allowed and that the plaintiff not be penalized or further subjected to any other punitive action of any kind, except as provided for by law, and that the plaintiff, Harold Layton, shall recover his costs herein expended, all pursuant to the prayer for the relief of the plaintiff's complaint.

This is a final and appealable order, there being no just reason for delay.

Ordered this 14th day of December, 1990.

/s/ ROBERT J. JACKSON,
CIRCUIT JUDGE

NOTICE OF ENTRY REQUIRED:
CR 77.04

DISTRIBUTION:

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COMMONWEALTH OF KENTUCKY
13TH JUDICIAL DISTRICT
GARRARD CIRCUIT COURT
NO: 90-CI-083

HAROLD LAYTON, PLAINTIFF
V.
GARRARD FISCAL COURT, ET AL.
DEFENDANTS

MEMORANDUM/ORDER

******

The Court having reviewed the record does find that the Court did cause to be filed an order ruling on all pending motions; said order did, among other things, sustained plaintiffs motion for a summary judgment.

Counsel for the respective parties shall take note of said order and they each may, if they so desire, submit for consideration, a proposed summary judgment.

Counsel shall submit any proposals that are consistent with this Court's ruling and pleadings of the record.

ORDERED this 20th day of November, 1990.

/s/ ROBERT J. JACKSON
CIRCUIT JUDGE

NOTICE OF ENTRY REQUIRED
CR 77.04
DISTRIBUTION
Attorneys of record

COMMONWEALTH OF KENTUCKY
13TH JUDICIAL DISTRICT
GARRARD CIRCUIT COURT

HAROLD LAYTON, PLAINTIFF
V.
GARRARD COUNTY FISCAL COURT and
RAY HAMMONDS, COUNTY JUDGE EXECUTIVE and
ARNETT METCALF
DEFENDANTS

ORDER RULING UPON PENDING MOTIONS AND SUSTAINING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

******

This matter came on before the court on November 9, 1990, pursuant to the motions of the plaintiff, Harold Layton, 1) for a summary judgment; and motions of the defendants, Garrard County Fiscal Court, et al, for 1) leave to file technical corrections; 2) to dismiss the case for lack of jurisdiction; and 3) for a summary judgment; appearing in open court and on the official stenographic record, is the Honorable Earl and Lee Dean for the plaintiffs, and the Honorable Mark Metcalf for the defendants; and the court having heard arguments and given consideration of the entire record and being otherwise sufficiently advised, does hereby ORDER as follows:

1) That the plaintiffs motion for a summary judgment is SUSTAINED; there being no genuine issue as to any material

fact and the plaintiff being entitled to a judgment as a matte of law. CR 52.01; CR 56.01 and those other authorities set forth in the plaintiff's brief.

2) The defendant's motion for leave to file technical corrections, is SUSTAINED;

3) The defendants motion to dismiss the case for lack of jurisdiction if OVERRULED for those reasons set forth in the official record. CR 12.02, CR 12.08, CR 52.01.

4) That the defendants motion for summary judgment is OVERRULED; there being no genuine issue of any material fact, but defendant is not entitled to a judgment as a matter of law. CR 52.01; CR 56.01; CR 56.02.

FURTHER IT IS ORDERED that counsel for the plaintiff shall submit, for consideration by this court, a summary judgment consistent with this ruling.

ORDERED this 15th day of November, 1990.

ROBERT J. JACKSON
CIRCUIT JUDGE

NOTICE OF ENTRY REQUIRED
CR 77.04
DISTRIBUTION
Attorneys of record

COMMONWEALTH OF KENTUCKY
13TH JUDICIAL DISTRICT
GARRARD CIRCUIT COURT
NO. 90-CI-083

HAROLD LAYTON
PETITIONER
V.
GARRARD FISCAL COURT, ET AL.

ORAL JUDGMENT FOR PLAINTIFF

[Petitioner has corrected punctuation and spelling and inserted clarifying words in brackets.]

COURT: Let me—before we talk about the Summary Judgment here a minute—I agree with the premise that the Legislature has the power to enact statutes. And I agree with the premise that they have the authority to enact KRS Chapter 67 and 68 and all of the others. And I also agree with the premise that you cannot appoint nobility—that is why we have terms of office. The real question in this deals with their reappointment, I think, and can you–obviously you cannot fire someone for political reasons. The question is, Can you not reappoint them for political reasons. That is the real issue that we have focussed in now on the pleadings.

There was in fact a dismissal for political reasons. It is there. So I think the case is in a posture, and I want to talk through it a little bit as I put it on the record and try to resolve the issues. I did read through all the briefs, and I

did look—I didn't analyze every case—but I did read through *Rutan* and *Elrod* and looked at the statutes. The issues by the pleadings—which I said—have been pretty well focused in. I want to compliment both of you. The briefs are [written] real well. They are voluminous but [in] this kind of case they have to be. They are tough cases. Stanley—under the old case law of 1920—Mr. Layton would be out of Court. He [respondent Hammonds?] could do it and that is part of it. But the Supreme Court of the United States for whatever reason and I think Mr. Metcalf [county attorney] alluded to it when he said you can [can't?] scrutinize the Fiscal Court. And I made me a note when you were talking and said, yes you can. It violates the constitutional rights, and that is where we have come in this country. I never lived in a vacuum but I just assumed—I mean, I have worked in elections, and I just quit rather than get fired. It was just kind of always accepted. But the Supreme Court of the United States, whether it be in their wisdom or otherwise, has elected to take a course in restricting political hiring and firings unless they are in upper policy making confidentiality positions. And I will talk through this in just a minute because that really—that is where this issue really comes down—on whether or not the duties of a County Treasurer are spelled out by statute or are they policy-making.

Let me say before I get too far [a]field that [concerning] the affidavits your rule [cited] is correct Mr. Dean. I checked it out again. Affidavits have to be filed on personal knowledge. There are a couple that Mr. Metcalf [county attorney] has filed from other County Treasurers that obviously would be based on their

personal knowledge. However, I think this Court's position will have to be that all of these affidavits—[what] the affidavit of Al Howell, Branch Manager of the State and Local Finance Office, Department of Local Government [indicates]. He says that he has been with the Department of local government for over 13 years, and I think that as says it better than anything else: "The Department of Local Government's position on the appointment and term of the County Treasurer is the same as states in KRS Chapter 68.010." The statute, as I said—and I don't have any problem with the statute—and I am not ruling it unconstitutional. The question is really in a little closer area, and we will talk about it in a minute.

Let me say first on the record that both parties had a motion for Summary Judgment. The parties seeking to recover may recover on a Summary under Civil Rule 56.01. And the judgment sought shall be rendered forthwith. That is what the rule says. If the pleadings and the depositions and the answers to interrogatories and stipulations and affidavits show there is no genuine issue as to any material fact and (b) the moving party is entitled to a judgment as a matter of law. On the other side, Mr. Metcalf's clients are party defendants and may at any time move with or without affidavits to support and move for a Summary Judgment. The judgment may be given on the record if there is no genuine issue of material facts and the moving party is entitled to a judgment as a matter of law.

A few general principles that I need to keep in mind when ruling on Summaries. The rule is not a substitute for a trial. Sometimes there is certain cases that use negligence and you just stay away from summary. Also the cases say use it cau-

tiously. You are not to knock either side whether it be Mr. Layton or the County Judge or the Fiscal Court. So Summary Judgment has to be done cautiously. The [Circuit] Court has a duty to render the judgment if there is no genuine issue of material fact and party, either one of them, is entitled to a judgment of law. This part I like. The Judge does not have to do Findings and Facts, but I feel that maybe sometimes I shouldn't talk so much and it would be easier right now to just stop and say the motion for Summary is granted or overruled. But I think when you are dealing with this kind of case I would like to do a little step further to show some logic and reasoning in what I am doing.

Is there a genuine issue as to any material fact? Well, the pleadings and the interrogatories and everything show and admit that this is a fact that the Plaintiff, Harold Layton, faithfully and fully performed his duties as County Treasurer since 1984 and reappointed in 1986 and Occupational Tax Commissioner [actually, Administrator] started in 1986. The Defendant, the Fiscal Court, had a meeting on January 4, 1990, in Executive Session relating to employees. That is what the minutes say. They appointed Arnett Metcalf as County Treasurer for the term to begin July 1, 1990, or upon resignation of the current treasurer. So on January 4th obviously Mr. Harold Layton was still County Treasurer because the minutes say on January 4th they have appointed Arnett Metcalf to take effect July of 1990 or upon resignation of Harold Layton. Harold Layton did not resign so at least on that day he was still the County Treasurer.

The minutes then reflect—and this is finding—that the hir-

ing of Arnett Metcalf is a patronage hiring. That is admitted in the answer and that is admitted in all the interrogatories and is stated that way. On the other side of the coin, the dismissal of Harold Layton is a patronage dismissal obviously. Did they refuse to reappoint him because of patronage? The answer is yes. That is admitted in the record.

Now the duties of the County Treasurer are as stated by the Plaintiff in the affidavits. They are controlled by statute. That is an area which is a little more difficult. We have some affidavits filed from different people that cite what the County Treasurer's duties are. We have to have a good relationship, and I would agree. I would agree that it is better to have a good relationship with the Fiscal Court to work. But the question is, does that relationship then make it in the area of policy making as *Rutan* says? The duties are controlled by statute. I am not going to take the time to restate them, but I did read the statute. KRS Chapter 68, and it spells out those duties. And for the most part it is [let it] suffice to say that the Fiscal Court controls the—the County Judge, I agree, Mr. Metcalf, is only one of many—but the Fiscal Court controls the office of the County Treasurer. So he works under someone. I believe those are facts admitting.

So I am ruling that there may be some facts in dispute. For example, I thought there was some question whether Mr. Metcalf had another meeting or there was something about maybe minutes missing or something. But there is no genuine issue to any material fact. So the answer [question is], is there a genuine issue as to material fact? The answer [is] no. The first part of granting Summary is over.

The next question is, And is this movant, either one of you, entitled to a Judgment as a matter of law? Can you fire or not appoint for political reasons? Yes, you can fire and not reappoint for political reasons if your policy-maker is in the area of confidentiality. If I am employed and working for the Mayor in any city in a policy-making position, then I can be fired. In addition to that, there is no specific statute dealing with mayoral appointees. So it is a little different than in some of those cases that you cite Mr. Metcalf. I am familiar with some of those cases. So that is really the question.

Is the movant entitled to a Judgment as a matter of law? KRS Chapter 68 and others gives the Fiscal Court at its June term every four years the right to appoint a treasurer. It gives the right at any time to remove for neglected duty and incompetency or dishonesty. I have already commented on the fact that the Fiscal Court had the statutory authority to appoint a County Treasurer. And I also noted already that the Fiscal Court has the power to fire for neglect and incompetency and dishonesty at any time. I have already noted those things so the question is, Can the Fiscal Court hire and fire a County Treasurer for political patronage or can the Fiscal Court dismiss Mr. Layton for political patronage or can they refuse to reappoint him even though he is in office January 4th, 1990. He was the County Treasurer on January 4th, 1990, because the minutes show that he will stay County Treasurer until June 30th [1990] unless he resigns. And I guess had he resigned, we wouldn't be here today. But he did not.

As I said, the *Rutan* case *vs. Republican Party of Illinois* citing *Elrod vs. Burns*, 427 U.S. 347 and *Branti vs. Finkel*,

445 U.S. 507, says "To the victor belongs only those spoils that may be constitutionally obtained." So obviously if it is a constitutional violation, then you can't do that. The Supreme Court has held that the patronage practices are really no good anymore unless they are in certain areas. *Rutan* also says that the government has the burden to show an overriding interest.

There has been an argument than an employee has no right to continue. Mr. Metcalf [county attorney] made a pretty good point on that because Kentucky's Constitution says you can['t] establish nobility by making me King forever. But the same employee [that] has no right to continue—as *Rutan* says—the burden is on the government to show that the party affiliation is necessary to perform the job.

I am not going to recite it, but this case really focuses in on, (1) Is the County Treasurer/Occupational Tax Commissioner a policy-making position? (2) Is his position the same position in the area of such confidentiality that it has to be that way? Of course, in this case party affiliation is not important because Mr. Layton is a Republican and the new county Judge is a Republican and the County Attorney is a Republican. So it is not like this case would sound a little stronger maybe if a Democrat had been fired. The Supreme Court says you can't do those things anymore unless you are in policymaking. That is the question. Policymaking. Non-policy people and [a] non-policy person has duties that are limited.

Question, does the County Tax Commissioner [County Treasurer] and Occupational License Commissioner [Occupational Tax Administrator] have limited duties? Answer, yes. KRS. Chapter 68 spells out those duties. He has a duty to receive

money, collect, deposit, and invest, and do all of those things. It is interesting the [that] statute says that a lot of these duties that he has to perform is subject to the control of the Fiscal Court. So obviously those are important controls.

Confidentiality: is he entrusted with sensitive materials? Mark [County Attorney Mark Metcalf], you argued and they are. I wouldn't want people to know about my money and everything, but practically speaking they are public records. You can get them though—he has got certain statutory duties. I am not sure that a County Treasurer is a confidential position. I will hasten to say—and this will be reviewed—I will hasten to say that the confidentiality side of it is not by law–I am saying that a County Treasurer is not a confidential position but a statutory appointment.

I will say that it is better to have (obviously) a cooperating Fiscal Court and County Treasurer. You know, they used to always say that it is not very pleasant working here. That is something that you are going to have to deal with. But I am ruling as a matter of law that the County Treasurer is not a policy-making position. It is not required to be in confidentiality. And it is not as *Rutan* ways a high-level position. It is a statutory appointment that the County Fiscal Court can do.

A non-policy-making, non-confidential government employee may not be discharged from a job that he is satisfactorily performing on the sole ground of his political belief. That is what *United States vs. Rutan* [sic] said and that is my holding. The motion for Summary is granted for the Plaintiff. You will have to go up as Appellee, Mr. Metcalf [county attorney].

MR. DEAN: Appellant, your honor.

COURT: All right. Let me say it is a hard case as they all are, but I believe *Rutan* supports that. And I think the real question is—that is the real question: Is the County Treasurer a policy-making position? I don't believe it is because the statutes spells out specific duties. So the motion is sustained.

MR. METCALF: Is the Court going to issue an opinion?

COURT: Well, that is why I put all of this on the record. Normally I don't have to do any findings, but in this case I have that prepared and give you some.

MR. METCALF: Is there going to be a ruling on Section 23 and 107 of the Constitution, your honor?

COURT: I will say that now. Kentucky's Constitution is all right. They tried to change it last Tuesday again. That is why I voted no on some things, but the statute is all right. The appointment is all right. This Court is only holding that a non-policy-making—that's what I am ruling–non-confidential—that's what I'm ruling—government employee, County Treasurer/ Occupational Tax Commissioner may not be discharged. He was in office as County Treasurer January 4th when the Fiscal Court met and appointed Arnett [Metcalf] to take the office months latter unless he [Layton] resigned. If he is performing a satisfactory job, and the record admits that he was doing a fine job and is a good man. And I think even the County Judge—there is evidence in there that supports that.

MR. METCALF: There is no question of that, your honor.

COURT: And had there not been an admission that it was political, I am afraid we would have to have a trial. But I think or I believe the Supreme Court of the United States and *Rutan* lost this case for you, Mr. Metcalf.

END OF PROCEEDINGS

DELIVERED: November 9, 1990
FILED: November 14, 1990

From the Record, TR 127
Filed 1 September 1990

AFFIDAVIT

Comes the Affiant, Harold W. Layton, and being first duly sworn to tell the truth, does hereby swear and depose as follows:

From the time that Ray Hammonds took over the office of Judge Executive in January, 1990, until this day, June 27, 1990, I have never been approached or contacted in any way concerning my desire to continue or resign my position as County Treasurer or Tax Administrator.

On Wednesday, June 27, 1990, at about 11:00 A.M., I went to Judge Hammonds office and asked him to come to my office because I had something I wanted to talk to him about. We went in and closed the door. The following is the conversation that took place.

"Ray I am going to treat you better than you treated me in January when you lowered the boom on me. I want you to know that I am going to contest my dismissal as County Treasurer and Tax Administrator at the Fiscal Court meeting tomorrow."

Ray immediately said, "Harold I respect you and I have nothing personally against you. You have done a good job. This was the hardest decision I ever made. Your brother, Lewis, jumped all over me and David was involved in things I did not like."

I said, "Ray, you surely didn't let that influence you to let me go. That is wrong as wrong can be. I'm glad I'm not built

that way."

Then Ray said that he was under a lot of pressure from outside sources to get rid of anybody connected to the Laytons. He also said that if the new appointment did not work out, I would be his next choice. We shook hands and parted.

And further affiant saith not.

WITNESS my hand this 19th day of July, 1990.

/s/ Harold W. Layton

STATE OF KENTUCKY)

: SCT

COUNTY OF GARRARD)

The foregoing affidavit was signed and sworn to and before me by Harold W. Layton, this 19 day of July 1990. My Commission Expires: 10-11-1990

/s/ John R. Ball
NOTARY PUBLIC

Supreme Court, U.S.
FILED
MAR 25 1993
OFFICE OF THE CLERK

No. 92-1439

In The

SUPREME COURT OF THE UNITED STATES

October Term 1992

HAROLD LAYTON,

Petitioner

v.

GARRARD COUNTY FISCAL COURT,
and RAY HAMMONDS, Judge-Executive
and ARNETT METCALFE, County Treasurer,

Respondents

On Petition For A Writ Of Certiorari
To The Commonwealth Of Kentucky
Court Of Appeals

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I.

Whether *Rutan v. Republican Party of Illinois*, 497 US 62 (1990), permits political affiliation as a consideration of an appointing authority regarding a confidential and constitutionally term-limited office like that of a county treasurer and tax administrator.

II.

Whether petitioner is limited on appeal to that issue determined at summary trial as to the nature of the office of county treasurer and tax administrator following his own motion for summary judgement.

III.

Whether jurisdiction in the Court is foreclosed by the separation of powers doctrine as to offices and officers like that in the instant case.

PARTIES BELOW

The parties below are the same as those appearing for and against the petition for writ of certiorari.

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In The
SUPREME COURT OF THE UNITED STATES
October Term 1992

HAROLD LAYTON,

Petitioner

v.

GARRARD COUNTY FISCAL COURT,
and RAY HAMMONDS, Judge-Executive
and ARNETT METCALFE, County Treasurer,

Respondents

On Petition For A Writ of Certiorari
To The Commonwealth Of Kentucky
Court Of Appeals

BRIEF IN OPPOSITION

May It Please the Court:

Respondents respectfully request that the petition for writ of certiorari to review the judgement and opinion of the Commonwealth of Kentucky Court of Appeals, entered in the above-styled matter on May 1, 1992, be denied.

JURISDICTION

Respondents submit there is no jurisdiction in the United States Supreme Court.

The Court speaks unequivocally regarding the issues upon which writ is sought. *Rutan*, *Branti* and *Finkel* are not offended by the holding of the Kentucky Court of Appeals. Rather, the holding specifically affirms those decisions, giving due regard to both letter and spirit of the fact sensitive analysis and reasoning upon which this Court relied. Petitioner quite literally states no valid claim for which relief may be granted. FRCP 12(b)(2).

Likewise, the separation of powers doctrine commands particular consideration. The Kentucky Court of Appeals, ruling the office of county treasurer and occupational tax administrator to embrace concepts of confidence, discretion, authority and involvement in development of fiscal policy, distinctly held the office to be one for which political affiliation may be contemplated by the appointing authority. Such holding in light of *Rutan* and its precedents forbids the intervention of courts into a province reserved for political questions and those who resolve them. *Baker v. Carr*, 369 U.S. 186 (1962). Thus, respondents urge denial and dismissal of the petition pursuant to FRCP 12(b)(2) and FRCP 12(b)(6).

PRINCIPAL STATE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Kentucky Constitution §23

> The General Assembly shall not grant any title of nobility or hereditary distinction, nor create any office, the appointment of which shall be for a longer time than a term of years.

Kentucky Constitution §107

> The General Assembly may provide for the election or appointment for a term not exceeding four years of such other county or district ministerial and executive officers as may from time to time be necessary.

Kentucky Revised Statute 68.010

County treasurer; appointment, term, oath, bond, removal, vacancy

(1) The fiscal court of each county, at its regular June terms every four (4) years, beginning with June, 1982, shall appoint a county treasurer for a term of four (4) years. If for any reason the county treasurer is not appointed at the June term, the county judge/executive shall call the fiscal court to meet immediately after the adjournment of the term on a day fixed by order entered on the order book of the court, and the meeting shall be held within two (2) weeks after the adjournment of the June term.

(2) The county treasurer shall take office on the July 1st immediately following appointment.

(3) No person is eligible to be county treasurer unless at the time of his appointment he is a citizen of Kentucky, at least twenty-five (25) years old, and has been for the two (2) years next preceding his appointment a resident of the county for which he is appointed. The county treasurer shall take the constitutional oath of office before the fiscal court, and shall execute bond with at least two (2) good sureties, to be approved by the fiscal court. The fiscal court may pay the premium on the bond from county funds.

(4) The fiscal court may remove the county treasurer at any time for neglect of duty, incompetency or dishonesty.

(5) In the case of a vacancy from any cause in the office of county treasurer, the county judge/executive shall call a special term of the fiscal court to fill the vacancy.

(6) The county treasurer holding office on April 2, 1982 shall serve until his successor is appointment and qualified.

Kentucky Revised Statute 68.020

County treasurer; duties and powers

(1) The county treasurer shall receive and receipt for all money due the county from its collecting officers or from any person whose duty is to pay money into the county treasury, and shall disburse such money in such manner and for such purpose as may be authorized by appropriate authority of the fiscal court. He shall not disburse any money received by him for any purpose other than that for which it was collected and paid over to him, and when he pays out money he shall take a receipt therefor. All warrants for the payment of funds from the county treasury shall be co-signed by the county treasurer and the county judge/executive.

(2) He may, and when directed by the fiscal court shall, invest the funds of the county pursuant to KRS 66.480.

(3) He may, and when directed by the fiscal court shall, institute actions in the name of the county against all delinquent sheriffs or collectors of the county, and against anyone having money belonging to the county who fails or refuses to pay it over on demand when due. He shall keep a record of all actions he is directed to institute on behalf of the county, showing their condition and the money collected thereunder.

(4) He shall keep an accurate detailed account of all money received and disbursed by him for the county, and shall keep books of accounts of the financial transactions of the county in the manner required by the uniform system of accounting prescribed by the state local finance officer.

(5) The county treasurer shall, when required by the fiscal court, settle his accounts as county treasurer, and within thirty (30) days after the close of each fiscal year, he shall, unless his immediate predecessor has done so, make a full and complete settlement for the preceding fiscal year with the fiscal court or with a person or persons whom the fiscal court, by order of record, appoints to make settlement with him. In case of a vacancy, the county judge/executive shall call a special meeting which shall proceed in the manner it deems proper to settle the accounts of the county treasurer.

COUNTERSTATEMENT OF THE CASE

I. BACKGROUND

On January 4, 1990 the Garrard Fiscal Court selected, with none dissenting, Arnett Metcalfe to serve as county treasurer of Garrard County effective July 1, 1990. In its February term 1990, respondent fiscal court reimposed an occupational tax abolished in its June term 1989 following the May primary. The fiscal court customarily vested the same individual with the offices of county treasurer and occupational tax administrator. Reconsidering its January resolution at petitioner's request during the fiscal court's June term 1990, the county attorney was directed to notify petitioner that his appointment expired June 30, 1990 consistent with the January resolution effective July 1, 1990. At no time following the inauguration of the present fiscal court was petitioner ever reappointed to any county office. Instead, he served in both offices till July 1, 1990, at which time his successor assumed office. Contrary to petitioner's allegations, respondent fiscal court did not violate any laws in appointing the new treasurer and tax administrator. The January resolution was effective July 1, 1990 and petitioner served his full term.

Summary judgement for petitioner was granted November 17, 1990, with a more specific order entered December 17, 1990. (Petitioner's Appendix 11a-14a) Upon respondents' motion for a new trial and alteration of the judgement, petitioner requested the court restore him to part-time status in the offices he once occupied. In response, the circuit court restored petitioner to a part-time position regarding both offices in violation of KRS 67.080(1)(f). Effectively, the

new judgement limited respondent fiscal court to offices of part-time status regardless of the duties of office and demands and resources of Garrard County. Respondents maintained throughout that the circuit court possessed no subject matter jurisdiction over political appointments consistent with Kentucky Rule of Civil Procedure 12 and could not prescribe the nature and duties of fiscal offices pursuant to KRS 67.083 and 67.080(1)(f). Respondents alleged the constitutionality of KRS 68.010, KRS 68.020 and §§23 and 107 of Kentucky Constitution.

Petitioner maintains that deception by respondent judge-executive enabled the appointment of respondent Arnett Metcalfe. Petitioner further alleges a retributive motive on the part of the judge-executive accomplished Metcalfe's succession. Yet the vote authorizing Metcalfe's appointment was unanimous. (four in favor and one abstention; Kentucky precedent finds that an abstention counts with the majority in a fiscal court ballot. *Lawrence County Fiscal Court v. Lawrence County* Ky., 229 SW 138 (1921). Likewise, a clear distinction exists between a county judge-executive and a county magistrate. The judge-executive is charged with, among other duties, responsibility for the day to day operations of the county and its agencies and, by virtue of office, agency heads. KRS 67.710. A magistrate exercises no control and operates as a legislator. No executive function obtains. KRS 67.040 and 67.078)

II. Kentucky Litigation

Summary judgement for petitioner entered December 17, 1990 was reversed by the Kentucky Court of Appeals on May 1, 1992. The court found the office of county treasurer and occupational tax administrator to occupy a high-level in county

affairs. Embracing attributes of confidence, discretion, authority and involvement in the development of fiscal policy, the Court of Appeals held the office is one of "import and vital function." (Petitioner's Appendix 7a). Nor lightly did the appellate court consider the legislative scheme of KRS 68.010 and 68.020 giving effect to the purpose and intent of Kentucky Constitution §§23 and 107. Candidly, the court stated that federal decisions do not mandate that respondent fiscal court reappoint petitioner, by reason of "preference" or otherwise, to the office of county treasurer upon the expiration of the four-year term. On June 12, 1992 the Court of Appeals denied petition for rehearing and, on December 9, 1992, the Kentucky Supreme Court denied discretionary review.

REASONS FOR DENYING THE WRIT

I.

***Rutan v. Republican Party of Illinois*, 497 US 62 (1990) and its precedents permit political affiliation as a consideration of an appointing authority regarding a confidential and constitutionally term-limited office like that of a county treasurer and tax administrator.**

§§ 23 and 107 of the present Kentucky Constitution preserve and protect elements of self-government and are made effective, in part, through KRS 68. 010 and 68.020.

KRS 68.010(1) decrees that a county treasurer shall be appointed by the fiscal court once every four years during the court's June term. As a fiscal officer of the county his or her term is coextensive with the fiscal year. In no case, however,

may a county treasurer remain in office beyond four years without reappointment. OAG 83-475; OAG 79-490.

Patently, the General Assembly created offices both elective and appointive, the tenure of which cannot exceed a term of years, specifically four. In part this legislative and constitutional scheme prevents perpetual office-holding by a handful of appointees who would otherwise be insulated from and insensitive to the demands of elected officials and ultimately the voters. The advancement of a republican democracy relies upon the avoidance of a few controlling in perpetuity a relatively large number of offices. The danger inherent as to significant appointive offices is that the appointees may frustrate the will of duly elected officials without accountability to the people and likewise prevent entry into government of groups historically denied participation at levels affecting policy. Terms of office are limited whether ministerial or executive. Kentucky Constitution §107. These limits, in combination with duties discrete, confidential and authoritative, are compelling and permit and produce the intended result of officeholders having no greater claim to office than the nearest election.

Augmenting the democratic process are First Amendment protections, ensuring the speech of government employees, even those hostile to superior officeholders, may not be conditioned in unconstitutional ways. Thus, the freedom to act and speak is not absolute, but is limited or qualified by the power of the state within reasonable limits to advance the interests of society consistent with compelling equities. *Potter v. Murray City,* 585 F. Supp. 1126, 1137 (D. Utah 1984), affirmed as modified, 760 F.2d 1065. Though a constitutionally recognized fundamental right is to be carefully guarded, it is not

unqualified. *Planned Parenthood of Rhode Island v. Board of Medical Review,* 598 F.Supp 625, 629 (D. R.I. 1984). Thus speech may be limited, but those limits must be narrowly drawn to advance compelling state interests. *Federal Election Commission v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 256 (1986).

The compelling state interest indicated by the Kentucky Constitution §§23 and 107 and KRS 68.010 and 68.020 is the right of a legislative body (a fiscal court) to select a fiscal officer who will execute its mandates and promote its agenda in letter and spirit. Put another way, "government has a significant interest in ensuring that it has effective and efficient employees." *Elrod v. Burns,* 427 U.S. 347, 365-366 (1976). A government's interest in securing employees who will loyally implement its policies can be accomplished by choosing or dismissing certain high-level or confidential employees on the basis of their political view. *Elrod,* at 365-368.

As defined within the *Rutan* line, an office, as distinguished from an employment, involves a delegation of express sovereign power or function of government to the officer. Public office thus implies legitimate authority to exercise discretion in administering duties and advancing the agenda of government. Manner of creation also sets a public office apart from mere employment. The former is created by constitutional or statutory authority and obliges the officeholder to fidelity, discretion and confidence both as to the appointing authority and the performance mandated. The latter is a function of contract and limits performance to duties routine, prescribed, subordinate and likewise removed from decisionmaking of a magnitude affecting policy. *Lasher v.*

Commonwealth, Ky., 418 SW2d 416, 417 (1967); *see also Howard v. Saylor*, Ky., 204 SW2d 815, 817 (1947)

No First Amendment cry is audible under these facts. An appointive officer, like that in the instant matter, cannot claim, in a republic such as this, that he maintains some vested right in a post subject to a term of years. Public offices are not hereditaments; they are agencies. They are created for the benefit of the public and are not granted for the incumbent. Given the potential and confidential nature of the office of county treasurer and occupational tax administrator no right attaches converting the office from appointive to bureaucratic. *Elrod*, at 365-366.

It is not the previous or even present role assumed by the treasurer in Garrard County which is at issue, but the potential of the office authorized by statutes. *Williams v. City of River Rouge*, 909 F.2d 151, 154 (6th Cir. 1990); *Charron v. Balogh*, 855 F.2d 356 (6th Cir. 1988); *Meeks v. Grimes*, 779 F.2d 417, 419 (6th Cir. 1985).

The dual appointment of petitioner to the office of occupational tax administrator and office of county treasurer, wholly consistent with KRS 68.010, 68.020, 67.080 and 67.083, enhances both the actual and potential nature of the treasurer's role and diminishes petitioner's claim that the statutes demand a cipher instead of an executive. Petitioner ignores his custody of public monies, budgetary responsibilities and the trust and confidence reposed in him. He eschewed the fact that no payment instrument could issue without his counter-signature. Yet, KRS 68.020(1) directs the county treasurer to receive and disburse monies payable to and from the county. Inherent in

this provision is discretion and responsibility to exercise judgement.

KRS 68.020(2) mandates the county treasurer to invest public monies. Though prescribed, implied is the obligation to recommend what types of investment would serve the short and long-term interests of the county. Concurrent with the foregoing obligation, the county treasurer selects or assists in the selection of financial institutions to serve as depositories of public funds and county owned securities. Moreover, the fiscal court cannot compel the payment of a claim if the county treasurer demurs. When placed on notice that the validity of a payable is suspect he may, if he chooses, decline a fiscal court order and await mandamus. *Cain v. Burroughs Adding Machine Co.*, Ky., 203 SW 315 (1918); *Harrison v. Logan County,* Ky., 110 SW 377 (1908); 1958 OAG 41,886.

KRS 68.020(2) further provides that the county treasurer shall invest public monies consistent with KRS 66.480. Express is the obligation to recommend what types of investment would serve the short and long-term interests of the county. KRS 66.480 (1) & (4) vests the county treasurer, upon delegation, with broad authority to select from a diverse range of investments in federal and state securities and institutions. It necessarily follows that both type of investment and maturity fall within the county treasurer's discretion. These are not the powers of an inconsequential employee.

KRS 68.020(3) authorizes the county treasurer, at his own initiative, to bring suit in the county's name to collect accounts payable and delinquent. He may adopt other means short of suit calculated to obtain delinquencies.

KRS 68.020(4) demands the county treasurer maintain a detailed statement of the county's accounts and financial transactions. In Garrard County, as in other Kentucky counties, the county treasurer assists in budget preparation. In this role the treasurer is privy to confidential and sensitive data, particularly tax and revenue information, regardless of whether he or she holds another fiscal office in which this information is routinely obtained. Petitioner is correct that the judge-executive, like any other elected chief-executive, is obligated to annual budget preparation. Yet, petitioner flees from the notion that the agency head who has custody of public monies and a detailed account of same is likewise a discrete, authoritative and confidential officeholder.

Heedless to what potential is embraced by the statutes, petitioner urges that the practice of the fiscal court under which he served is and should be the same for *all* fiscal courts and similar positions in local governments nationwide. Parochial in outlook, petitioner urges the Court to find his and the previous fiscal court's version of the relationship between the county treasurer and occupational tax administrator and fiscal court to be the model for an entire state (and nation as it were). Petitioner pays no deference to the scale, resources, obligations and diverse conditions affecting other counties and their offices.

Comparison reveals the strength of respondents' argument. *Rutan* considered the cases of low-level employees seeking promotion or recall to non-policy-making positions. In short, the parties therein, even if promoted or recalled, would remain low-level employees. Their positions were, respectively, rehabilitation counselor, heavy equipment operator, prison guard, garage worker and dietary manager. In *Branti v. Finkel,*

445 U.S. 508 (1980) the positions at issue were those of assistant public defenders. In *Elrod*, the positions under scrutiny were those of deputy sheriffs. None of the parties held office by virtue of a statute mandating their appointment or constitutional provision limiting their term. Nor did their duties elevate their positions to a nature discrete, confidential and authoritative.

Critical to this analysis is the contrast between the above matters and cases wherein dismissals or failure to reappoint were held permissible. Thus, in *Cordero v. DeJesus-Mendez*, 867 F.2d 1, 13-14 (1st Cir. 1989), the director of finance was dismissed on political grounds, his office being responsible for the city's accounting system and directly reporting to the appointing authority, the mayor. *Bicanic v. McDermott*, 867 F.2d 391 (7th Cir. 1989) and *Charron v. Balogh*, 855 F.2d 356 (6th Cir. 1988), possess similar equities and suggest the same result as to petitioner.

Williams v. City of River Rouge, 909 F.2d at 154, culminates the *Elrod*, *Branti* and *Rutan* lines of cases. Therein a part-time city attorney was held to occupy a post the nature of which permitted appointment and dismissal by a mayor and city council. The Sixth Circuit held his appointment, though merely part-time, vested him with involvement in municipal affairs rising to the level of confidence, discretion and authority. It is potential as well as practice the Sixth Circuit examined. Thus "[t]he relevant focus of analysis is the inherent duties of the position in question not the work actually performed by the person who happens to occupy the office." *Williams*, 909 F.2d at 154; *Meeks v. Grimes*, 779 F.2d at 419; *Ness v. Marshall*, 660 F.2d 517, 522 (3rd Cir. 1981).

The rational ends of appointing those who will faithfully promote the political agenda of confidential public offices satisfy the vital state interest which must be present when a First Amendment right is at issue.

As argument and comparison reveal, petitioner falls well outside that class of individual protected under the First Amendment and its interpretation under the *Rutan* line.

II.

Petitioner is limited on appeal to that issue determined at summary trial as to the nature of the office of county treasurer and tax administrator following his own motion for summary judgement.

From the filing of the complaint to the request for writ, petitioner raises the spectre of malfeasance and manipulation on the part of respondent judge-executive and fiscal court members. Even the trial court which gave petitioner judgement made no findings as to those allegations nor did petitioner assert independent state claims embracing those now inchoate causes. They are barred.

Petitioner alleged at summary trial that his dismissal was the product of patronage; respondents answered affirmatively. The task of the court was then to apply law to stipulation. The "drastic remedy" of summary judgement was invited. *Tomalewski v. State Farm Life Insurance Co.*, 494 F.2d 882, 884 (3d Cir. 1974). The trial court's function was not to arbitrate the accusations of petitioner, since the record was and is absent choate claims of malfeasance or misfeasance, but only to

determine whether any issue of fact existed to be tried. *Ransburg Electro-Coating Corp. v. Landsdale Finishers, Inc.*, 484 F.2d 1037, 1039 (3d. Cir. 1973); *Lockard v. Hoenstine*, 411 F.2d 455, 458 (3d Cir. 1969), *cert. denied* 396 U.S. 941 (1969). Petitioner's claims regarding the bad faith of those appointing one other than himself fail, then, on two obvious grounds. First, the actionable claims, if any, were not brought. These assertions were intended, presumably, to give weight to the *Rutan* claim, not to stand as independent causes. Secondly, where intent is a substantive element of the cause of action (as it would be as to petitioner's fallow assertions), "[t]he principle is particularly apt that courts should not draw factual inferences in favor of the moving party and should not resolve any genuine issues of credibility. *Ness v. Marshall*, 660 F.2d at 519; *Associated Hardware Supply Co. v. Big Wheel Distributing Co.*, 355 F.2d 114, 121 (3d Cir. 1966).

Petitioner fashioned his claim, then sought and obtained summary judgement. He cannot now be heard on more than the law and its application to his and respondents' admission.

III.

Jurisdiction in the courts is foreclosed by the separation of powers doctrine as to offices and officers like that in the instant case.

The issue created by petitioner's cause involves a political question and an attempt by him to encroach on legislative schemes which cannot be arbitrated by a court of law. The authority relied upon by respondents states "[T]he fiscal court may ... establish all appointive offices, set the duties of

those offices, and approve all appointments to these offices...." KRS 67.080(1)(f). Furthermore, the fiscal court is empowered to carry out governmental functions necessary for the operation of the county. KRS 67.083(3). Consistent with statute, the fiscal court is charged with the appointment of a county treasurer, such appointment to be made once every four (4) years. KRS 68.010.

Petitioner asks the Court to ignore the legislative domain of the fiscal court and impose on county government a person its elected assembly spurned. No legislative scheme granted him immunity from the adverse consequences of an election in which his patrons might be defeated. His term as an appointive officer, an officer of considerable confidence and discretion, was nearly coextensive with those whose lease on political office was subject to renewal by the qualified voters of the county. Thus, petitioner concludes that the not quite coextensive term of office proves his case, that political considerations are impermissible. He ignores that continuity between administrations is essential to efficient transfer of authority and public confidence and is, in itself, a rational political end.

This argument neglects that staggered terms for political appointees are not exceptional but by constitutional and statutory mandate present at all levels of county and state government. From the board membership of taxing districts to the boards of university trustees and regents, the racing commission, the lottery commission, and workers compensation board members and administrative law judges, all appointees respond directly to an appointing authority, are selected to promote policy, advise and consult, and enforce laws. When the

authority changes, neither their mandate nor their responsibility is altered. Confidence, authority and discretion repose in their offices till the expiration of their terms. In short, petitioner would upset a legislative scheme with rational and discernible governmental ends consistent with and not violative of constitutional protection. *Wall Distributors, Inc. v. City of Newport News, Virginia*, 782 F.2d 1165 (4th Cir. 1986); *Ocala Kennel Club, Inc. v. Rosenberg*, 725 F. Supp. 1205 (N.D. Fla. 1989). These ends are primary and rooted firmly in the reality of operating a government responsive to the needs of its citizens and the resolutions of its local legislature. *Dickeson v. Quarberg*, 844 F.2d 1435 (10th Cir. 1988); *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251 (7th Cir. 1989).

Applying *Baker v. Carr*, 369 U.S. 186, 217 (1962), the High Court should deny writ as courts are without jurisdiction in political disputes. *Baker* held that prominent on the surface of any case involving a political question is found, disjunctively, a textually demonstrable constitutional commitment to a coordinate political department, a lack of judicially discoverable and manageable standards for resolving it, the impossibility of deciding the issue without an initial policy determination of a kind clearly for non-judicial discretion, the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government, an unusual need for unquestioning adherence to a political decision already made or the potential of embarrassment from multifarious pronouncements by various departments on one question. Upon all these factors and for reasons following, the Court should observe the separation of powers and its own lack of authority to arbitrate this political question.

Petitioner advances claims which are without basis, legally or factually. He claims defects in the statutory scheme by which he was appointed (the dearth of a preference) and the absence of any protection after his patrons' fall from political grace. This Court cannot offer safe harbor. "[Q]uestions about actual origination of legislation or legislative concepts, or adoption of such legislation, and the manner in which defects may be remedied, if at all, are political questions best left to the legislature to resolve." *United States v. Madison*, 712 F. Supp 1379, 1383 (W.D. Wis. 1985). Petitioner seeks intervention of the courts in a matter reserved solely to the local legislature: the selection of its officers.

This Court must properly invoke the political question doctrine and deny writ under facts where the political process provides effective redress for petitioner's complaint: the election of those friendly to his point of view. *Smith v. Reagan* 663 F. Supp 692, 694 (E.D. N.C. 1987). In a political question the Court must apply the separation of powers doctrine when a question is found to involve a textually demonstrable constitutional commitment of the issue to a coordinate political department. *Smith v. Reagan*, 637 F. Supp 964, 966-977 (E.D. N.C.1986); *see also Baker v. Carr*, at 217 (1962). A suit is not justiciable if the case presents political questions. *Apache Bend Apartments, Ltd. v. United States*, 702 F. Supp. 1285, 1290 (N.D. Tex. 1988).

The United States departs from the common law tenet making public offices grantable by the sovereign in which the holder acquired and held an estate. Petitioner's argument that he possesses a preference to reappointment invites comparison and rejection. This archaic common law view is repugnant to

the very institution of our form of government. *Ahearn v. Bailey,* Ariz., 451 P.2d 30 (1969); *State v. District Court*, Mont., 206 P.2d 166, 199 (1949).

The unusual need for adherence to the political decision of the Kentucky General Assembly is manifest. The vital and ancient desire of colonists in the eighteenth century to cast off burdens of class and tyranny ingrained in their successors the same revulsion for lifetime sinecures, especially those whose proximity to government could prove frustrating and effectively render a legislature unresponsive to its citizens. Adherence to the General Assembly's policy under these facts fosters responsive and responsible county officers.

For the Court to reverse the distinct constitutional and statutory obligations, invigorating the political process as to compelling governmental ends, invites contradictory pronouncements on precise and settled questions. It is not merely the office of county treasurer and occupational tax administrator at issue, but rational concepts of terms of office drawn to affect the vitality of purposeful government as to critical positions that cannot simply nor singularly be redefined by this Court nor by coordinate branches without conflict. Writ is indeed inappropriate. Especially since these statutes (KRS 68.010 and 68.020) are already narrowly drawn and gender, race and party neutral, they cannot be more protective of the officeholder's rights without violating a state's right to guarantee meaningful self-government to its localities.

Petitioner finally diminishes the office of occupational tax administrator as to attributes of confidence, discretion, authority and involvement in the development of policy.

Petitioner misrepresents the nature and duties of the occupational tax administrator. He complains the functions of this office are so circumscribed as to render it impotent of any vital function or policymaking imperative. In fact, the occupational tax administrator is vested with significant authority and discretion. The ordinance creating the office speaks decisively to this issue. (Should writ be granted this ordinance shall be printed in its entirety.)

Section IX, paragraph one of the ordinance mandates the Administrator shall "prescribe" forms of all reports required by the act. Paragraph two is equally authoritative:

> Nothing shall prevent or preclude the Administrator from conducting an examination and audit of the books, records, and accounts, as herein provided at any time he may have reasonable grounds to believe that the license has not been correctly reported and paid the license fee due under the provisions of this order.

Paragraph three addresses the confidence reposed in the office in that "[A]ll information obtained by the Administrator or any of his agents or employees ... shall be treated and considered as confidential or privileged ... and shall not be open to inspection by the public."

Paragraph five enlarges the authority that petitioner disdains, to wit: "[I]t is further provided that the Administrator ... shall have the right to disclose to the Commissioner of Revenue of the State of Kentucky ... any of the information protected by Section VIII of this order, provided reciprocal right to information . . . is made available to the County. . . ." All of

these functions are administered at the instance of the officeholder.

Throughout his argument, petitioner denies that political affiliation is a permissible consideration in the selection of the offices at issue. However, in *Sweeney v. Bond,* 669 F.2d 542, 546 (8th Cir. 1982), *cert. denied*, 459 U.S. 878 (1982), the court held fee agents[1] are symbols of the sovereign and that party affiliation is an appropriate requirement for the effective performance of such offices. Still petitioner challenges a process by which he was and remained a beneficiary of patronage himself. For six years, under two successive courts, he fulfilled a role vital in affecting fiscal policy, reflective of the appointing authority's mandate and subject to and in promotion of the political agenda established by the county legislature. In an era where local governments are required to bear an ever increasing share of the fiscal burden, petitioner asserts the chief fiscal appointee of county government is a cipher. To be sure respondents possess a legitimate interest in insuring efficient representation in revenue matters. *Orenstein v. Bond,* 528 F.Supp 513, 519 (E.D. Mo. 1981).

That a political question exists invoking application of the separation of powers doctrine and denying the merit of the petition for writ can be disputed but not defeated under the law and facts of the instant case. As the offices under review embrace concepts which the *Rutan* line excepts from protection so too does the separation of powers analysis foreclose

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[1] Fee agents are individuals authorized by statue to issue motor vehicle licenses and collect motor vehicle use taxes as agents of the Missouri Revenue Department.

jurisdiction consistent with FRCP 12(b)(2) and denial and dismissal consistent with FRCP 12(b)(6).

CONCLUSION

For the foregoing reasons, the petition for writ should be denied and the Kentucky Court of Appeals affirmed.

Respectfully submitted,

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APR 8 1993

No. 92-1439

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM 1992

HAROLD LAYTON,
Petitioner
v.
GARRARD COUNTY FISCAL COURT
and RAY HAMMONDS, Judge-Executive,
and ARNETT METCALF, County Treasurer,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

In the Counterstatement to the Questions Presented, respondents suggest that "petitioner is limited on appeal to that issue determined at summary trial as to the nature of the office of county treasurer and tax administrator following his own motion for summary judgment" (p. i, item II; pp. 10-11).

Respondents have routinely sought to evade misconduct charges, but this is the first substantive appearance of this argument.

Petitioner's motion for summary judgement (Trial Record 125-126) relies on the "entire record", and *attached to that motion, when it was filed*, was petitioner's affidavit reporting respondent Hammonds' retributive motive (Petition, pp. 27a-28a, Trial Record 127), which was never denied by respondents.

Petitioner's Brief for Plaintiff in Support of Motion for Summary Judgement was filed simultaneously with the motion for summary judgment. An excerpt is attached hereto (pp. 1a–2a). There, petitioner urges that respondents not be allowed to advance a defense of compelling government interest when the only motive stated by respondents before petitioner brought suit was retribution directed at Layton's relatives.

When respondents sought new trial in Garrard Circuit Court, petitioner introduced the evidence of procedural misconduct regarding the January appointment of respondent Metcalf and the failure of respondents to dismiss petitioner, or hire another, as tax administrator (Trial Record 281-396). This mate-

rial was formally presented as a basis to deny a new trial, and Garrard Circuit Court denied same.

The evidence for misconduct was recapitulated for the Kentucky Court of Appeals and the Kentucky Supreme Court, and it was formally presented to both courts that misconduct, having in this case violated the Fourteenth Amendment, provided an independent basis to affirm Garrard Circuit Court.

In *American Jurisprudence* it is asserted that,

> According to the essence of its function, an appellate court is concerned with whether the holding, and not whether the reasoning, of the decision appealed from is correct, and generally a correct decision will not be disturbed on appeal because it is based on an incorrect ground, *especially where the correct ground was formally presented to the court below, though not there acted upon,* and the view has also been taken that in a proper case a correct decision should be sustained even though the appellate court finds it necessary to resort to a theory not presented to the court below (5 *Am. Jur.* 2d, Appeal and Error, §727, p. 170, emphasis added).

Even though this principle of law has been affirmed in Kentucky (see, e.g., *Haddad v. Louisville Gas & Electric Co.* (Ky) 449 SW2d 916 (1970)), there is no evidence that the appellate courts of Kentucky made any effort to honor this principle. Because the charges and evidence of misconduct were fully documented in Garrard Circuit Court, and preserved throughout litigation in Kentucky, they are preserved for this Court.

Petitioner's objection to respondent's attempt to evade charges of misconduct should not be construed to diminish the confidence petitioner places in the reasoning of Garrard Circuit Court, which relied on the standards of *Elrod*, *Branti*, and *Rutan* (Petition, pp. 8, 15). In the Brief in Opposition, respondents continue to shift from these standards, relying instead on diffuse "concepts of confidence, discretion, authority, and involvement in the development of fiscal policy" (e.g., Brief in Opposition, pp. x, 3, 9, 12, 15, 16).

This shift leads respondents to confuse the degree of responsibility with the *nature of the responsibilities*, and to confuse the confidence placed in the treasurer, and the confidential tax records in his custody, with *political confidentiality*. Petitioner submits that the Court should not condone these errors, since the net of the exceptions of *Elrod* should not be cast "too wide to allow [lack of] political support to be used to extrapolate a tendency to breach a sworn duty, behave unprofessionally, or commit criminal acts" (*Meeks v. Grimes*, 779 F.2d 417, 421 (7th Cir. 1985)).

Moreover, respondents persist in magnifying the role of treasurer. For example they interpret KRS 68.020 (3) contrary to its plain meaning when asserting that the treasurer, acting entirely on his own initiative, can bring suit against delinquent parties (Brief in Opposition, p. 7).

Respondents bring forth a third Question: "Whether jurisdiction in the Court is foreclosed by the separation of powers doctrine as to offices and officers like that in the instant case" (p. i, item III; pp. 11-18).

Here is petitioner's view of the matter:

Under KRS 68.010, Garrard Fiscal Court has substantial freedom, every four years, in June, to appoint a competent, honest, and industrious person to serve as county treasurer.

But the power to appoint is not absolute. Rather, that power must be exercised in substantial compliance with lawful procedure and in conformity with constitutional principles. The power to appoint does not legitimize an appointment made by just *any* process, or for just *any* reason. Specifically, the power to appoint should not confer on a member of Garrard Fiscal Court the authority to coerce and manipulate an appointment to pursue a private grievance. And the power to appoint should not, by itself, legitimize a patronage practice that would otherwise be prohibited by *Rutan* and its precedents.

The entry of the Attorney General of Kentucky at this juncture demonstrates the significance of this case to a state in which arbitrary employment and appointment practices commonly prevail at all levels of state and local government.

The appellate courts of Kentucky have sanctioned an abuse of power, and the Attorney General of Kentucky has joined in its defense. Our judicial system fails this petitioner if he cannot find refuge in the Supreme Court of the United States.

Respectfully submitted,

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5 April 1993

APPENDIX

From the Record
Filed 1 September 1990

Excerpt from Petitioner's
BRIEF FOR PLAINTIFF
IN SUPPORT OF MOTION FOR SUMMARY
JUDGEMENT
(Trial Record 84–85)

The plaintiff [Petitioner Layton] has filed his supporting Affidavit in this case concerning his meeting with County Judge Executive, and statements made by Judge Hammonds: he did not say that Arnett Metcalf was hired as a political reward, nor did he say that he thought Harold Layton's work was in any way deficient or that he would have some difficulty working with him, to the contrary saying that he would have been willing to work with him, nor did he say that Harold Layton would have worked to thwart the goals of his administration, nor saying that it was necessary to have a chosen appointee to ensure the effective performance of the Treasurer's duties.

What the Harold Layton Affidavit shows that Judge Hammonds did say is that Harold Layton was being dismissed

because of what his relatives did, and that he, the County Judge Executive, was under pressure to deliver retribution to "anyone connected to the Laytons" although not because of any action Harold Layton took. Judge Hammonds' remarks imply that he believed that Harold Layton had some reasonable expectation of reappointment, and, since Harold Layton was the County Judge's second choice, the Judge must not have known of any reason why he could not work with him.

The point here is that the justification for the dismissal now advanced by the defendant is all developed after-the-fact and has nothing to do with the true intent and motivation, as a mere condition and not a cause for the replacement of Layton by Metcalf, hence defendants should not be allowed to concoct a defense of compelling or vital government interest, when the truth is shown by piercing the corporate or body politic shield as it were that the sole, ulterior motive and purpose was to make all Laytons open season.